

A **Teck Guan Trading Sdn Bhd v
Hydrotek Engineering (S) Sdn Bhd & Ors**

HIGH COURT (KOTA KINABALU) — SUIT K153 OF 1991

B IAN CHIN J
7 OCTOBER 1995

C *Contract — Coercion — Whether party contending coercion had proven that an offence had been committed under the Penal Code (FMS Cap 45) — Whether refusal to supply goods contracted to be sold amounted to unlawful detention of property — Contracts Act 1950 s 15*

Contract — Undue influence — Whether plaintiff in position to dominate will of defendants — Whether transaction was in the ordinary course of business — Contracts Act 1950 s 16

D *Contract — Damages — Delivery — Late delivery — Whether failure to give notice of intention to claim compensation when accepting late delivery amounted to waiver — Contracts Act 1950 s 56(3)*

Contract — Guarantee — Guarantor's liability — Whether guarantors liable when notice of demand sent to address different from that expressly stated in the guarantee — Interpretation of clause deeming service

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Teck Guan Trading Sdn Bhd ('the plaintiff') agreed to sell round bars to Hydrotek Engineering (S) Sdn Bhd ('the first defendant'), the payment for which was guaranteed by John Fong Nyuk Foh ('the second defendant') and Christine Voo Heng Choong ('the third defendant'). The dispute here mainly concerned the price of the round bars. The defendants contend that the price was stated as RM1,180 in a document dated 27 July 1990. However, the plaintiff alleged that there was a typing error as the actual price should be RM1,244. The plaintiff produced a letter dated 18 September 1990 by the first defendant agreeing to pay RM1,244 for the round bars.

G The first defendant stated that they initially resisted the demand but later agreed as the plaintiff persistently refused to supply; they required the bar to produce the concrete they had committed themselves to supplying; and there was no time to look for any other source of supply. The round bars were delivered on 19 September 1990 and the first defendant accepted delivery. Due to the failure of the defendants to pay for the balance of payment for the bars sold, the plaintiff sent a notice of demand to the second and third defendants at the address of the first defendant. As there was no reply from the defendants, the plaintiff commenced action and on 18 February 1992 took out an application for summary judgment and striking out of the defendants' counterclaim which was granted by the senior assistant registrar. The defendants appealed against the decision as they alleged that on the facts of the case there was an inference of undue influence and/or coercion with reference to 'economic

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blackmail'. The second and third defendants also contended that they did not receive the letter of demand as it was not sent to the address expressly set out in the guarantee. A

Held, dismissing the appeal:

- (1) There are two ways of committing 'coercion' as defined by s 15 of the Contracts Act 1950 ('the Act'), one of which is the threatening of an act forbidden by the Penal Code (FMS Cap 45) ('the Code'), while the other is the unlawful detention or the threatening of such to the prejudice of any person, with the intention of causing any person to enter into an agreement. The party contending that there was coercion must say what offence had been committed under the Code before the court could decide whether such an offence had been committed. However, this was not done here and, on the facts of the case, no offence under the Code had been revealed. Further, the refusal of the plaintiff to supply the round bars at RM1,180 did not amount to unlawful detention of property as the plaintiff was exercising its legal right over its own property. Therefore, there was no question of coercion being committed by the plaintiff on the first defendant (see pp 337G-I, 338B-D). B C D
- (2) The contention of 'economic blackmail' has been variedly termed under the English law as 'commercial pressure', 'economic duress' and 'unfair use of a dominant bargaining position'. However, the parties here were dealing with each other at arms' length and in fact the first defendant had before agreeing to the new price, threatened legal action. Given their pugilistic stance before the agreement, the plaintiff could not be said to be in a position to dominate the will of the defendants within the ambit of s 16 of the Act. The transaction in this case was a transaction in the ordinary course of business (see pp 338E-F, 340D-E; *Pao On v Lau Yiu Long* [1980] AC 614 followed). E F
- (3) In cases of late delivery, the failure of a party to give notice of their intention to claim compensation as required under s 56(3) of the Act, would be regarded as waiver of that right (see p 340G-H). G
- (4) It is a matter of interpretation of a particular clause when attempting to ascertain its meaning. The wordings of the clause of the guarantee in the present case deeming service made it clear that the receipt of the demand was deemed to have taken place notwithstanding that the second and third defendants (the guarantors) may not have received them and this was abundantly clear from the words 'despite evidence to the contrary' in the clause. The words of the clause allowed the plaintiff to choose between sending to the specific address mentioned in the guarantee or to the 'last known address' of the second and third defendants. Therefore, considering that at the relevant time the second and third defendants were the chairman and the general I

- A manager respectively of the first defendant, the demand here had been properly served on the second and third defendants when sent to the address of the first defendant (see pp 341G-I, 342A-B; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 distinguished; *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 followed).
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[Bahasa Malaysia summary]

- C Teck Guan Trading Sdn Bhd ('plaintif') bersetuju untuk menjual batang rod kepada Hydrotek Engineering (S) Sdn Bhd ('defendan pertama'), pembayaran untuknya digerenti oleh John Fong Nyuk Foh ('defendan kedua') dan Christine Voo Heng Choong ('defendan ketiga'). Pertikaian di sini berkenaan dengan harga batang rod itu. Defendan mendakwa bahawa harga yang dinyatakan adalah RM1,180 seperti yang terdapat dalam suatu dokumen bertarikh 27 Julai 1990. Walau bagaimanapun, plaintif mengatakan bahawa terdapat satu kesilapan menaip kerana harga sebenarnya adalah RM1,244. Pihak plaintif mengemukakan sepucuk surat bertarikh 18 September 1990 daripada defendan pertama di mana ia bersetuju membayar RM1,244 untuk batang rod tersebut. Defendan pertama berkata bahawa pada mulanya ia tidak mahu menerima tuntutan itu tetapi akhirnya telah bersetuju kerana plaintif tetap enggan memberikan bekalan; ia memerlukan bekalan itu untuk menghasilkan konkrit yang telah dijanjikan; dan tidak ada masa untuk ia mendapatkan bekalan dari tempat lain. Batang rod itu telah dihantar pada 19 September 1990 dan defendan pertama menerima penghantaran itu. Di atas kegagalan defendan untuk membayar baki bayaran untuk rod yang dijual itu, plaintif telah menghantar notis tuntutan kepada defendan kedua dan ketiga di alamat defendan pertama. Oleh kerana tidak terdapat sebarang balasan daripada pihak defendan, plaintif telah memulakan tindakan dan pada 18 Februari 1992 membuat permohonan untuk penghakiman terus dan untuk membatalkan tuntutan balas defendan yang telah diberikan oleh penolong kanan pendaftar. Defendan merayu terhadap keputusan itu kerana mereka mengatakan bahawa di atas fakta kes terdapat inferens pengaruh tak wajar dan/atau paksaan dengan rujukan kepada 'peras ugut ekonomik'. Defendan kedua dan ketiga juga berhujah bahawa mereka tidak menerima surat tuntutan itu kerana ianya tidak dihantar kepada alamat yang dinyatakan di dalam gerenti itu.
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Diputuskan, menolak rayuan itu:

- I (1) Terdapat dua cara untuk melakukan paksaan (coercion) seperti yang ditakrifkan oleh s 15 Akta Kontrak 1950 ('Akta itu'), salah satunya ialah mengugut untuk melakukan sesuatu tindakan yang dilarang oleh Kanun Keseksaan (NMB Bab 45) ('Kanun itu'), sementara yang satu lagi ialah tahanan yang menyalahi undang-undang atau mengugut sebegitu yang akan menyebabkan prejudis terhadap seseorang, dengan niat mengakibatkan seseorang memasuki sesuatu perjanjian. Pihak yang mendakwa bahawa

terdapat paksaan mesti menyatakan kesalahan yang dilakukan di bawah Kanun itu sebelum mahkamah dapat memutuskan sama ada kesalahan itu telah dilakukan. Walau bagaimanapun, ini tidak dibuat di sini dan, atas fakta kes, tiada kesalahan di bawah Kanun itu ditunjukkan. Leagipun, keengganan plaintif untuk membekalkan batang rod pada harga RM1,180 bukanlah tahanan yang menyalahi undang-undang kerana plaintif menggunakan haknya di sisi undang-undang ke atas hartanya sendiri. Maka, paksaan tidak dilakukan oleh plaintif ke atas defendan pertama (lihat ms 337G-I, 338B-D).

- (2) Pertikaian 'peras ugut ekonomik' telah ditermakan dalam berbagai-bagai cara di bawah undang-undang Inggeris iaitu seperti 'tekanan perdagangan', 'dures ekonomik' dan 'penggunaan kuasa tawar-menawar dominan yang tidak adil'. Walau bagaimanapun, pihak-pihak di sini telah berunding secara berwaspada, malah defendan pertama telah mengugut hendak membawa tindakan undang-undang sebelum bersetuju dengan harga baru itu. Dengan pendirian mereka yang sentiasa berlawanan itu sebelum persetujuan dicapai, plaintif tidak boleh dikatakan berada dalam keadaan dominan sehinggakan dapat mengawal kehendak defendan seperti dalam s 16 Akta itu. Transaksi dalam kes ini adalah transaksi dalam aliran perniagaan biasa (lihat ms 338E-F, 340D-E; *Pao On v Lau Yiu Long* [1980] AC 614 diikuti).
- (3) Dalam kes hantar-serah yang lewat, kegagalan sesuatu pihak untuk memberikan notis mengenai niat mereka menuntut pampasan sebagaimana yang dikehendaki oleh s 56(3) Akta itu, akan disifatkan sebagai penepian hak itu (lihat ms 340G-H).
- (4) Adalah menjadi perkara pentafsiran sesuatu fasal apabila cuba menentukan maknanya. Perkataan dalam fasal dalam gerenti di dalam kes ini yang mensifatkan penyampaian jelasnya menyatakan bahawa penerima notis tuntutan disifatkan telah berlaku walaupun defendan kedua dan ketiga (penggerenti) mungkin tidak menerimanya dan ini adalah sangat jelas daripada perkataan 'walaupun terdapat keterangan yang menunjukkan sebaliknya' dalam fasal itu. Perkataan dalam fasal itu membenarkan plaintif memilih antara menghantar ke alamat spesifik yang dinyatakan di dalam gerenti itu atau ke alamat terakhir defendan kedua dan ketiga yang diketahui. Maka, memandangkan yang pada masa yang relevan defendan kedua dan ketiga merupakan pengerusi dan pengurus besar masing-masing di dalam defendan pertama, tuntutan di sini telah disampaikan dengan cara yang betul ke atas defendan kedua dan ketiga apabila ianya dihantar ke alamat defendan pertama (lihat ms 341G-I, 342A-B; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 dibeza; *Amanah Merchant Bank Bhd v Lim Tow Chon* [1994] 1 MLJ 413 diikuti.)

[*Editorial note*: The appellants have appealed to the Court of Appeal vide Civil Appeal No S-02-703 of 1995.]

A Notes

For a case on coercion, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1349.

For a case on the domination of the will of other party, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2289.

B For cases on late delivery, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1458–1460.

For cases on guarantor's liability, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1679–1693.

Cases referred to

- C** *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281
Pao On v Lau Yiu Long [1980] AC 614

Legislation referred to

- D** Contracts Act 1950 ss 15, 16, 56(3)

PK Lim (PK Lim & Co) for the appellants.

Norbert Yapp (Jayasuriya Kah & Co) for the respondents.

E *Cur Adv Vult*

Ian Chin J: Teck Guan Trading Sdn Bhd ('the plaintiff') sued Hydrotek Engineering (S) Sdn Bhd ('the first defendant'), John Fong Nyuk Foh ('the second defendant') and Christine Voo Heng Choong ('the third defendant') for RM332,966.84 being the balance payable for round bars sold and delivered to the first defendant and which payment was guaranteed by the second and third defendants. The plaintiff on 18 February 1992 took out an application for summary judgment and for striking out of the counterclaim which was heard on 13 October 1994 and granted by the learned senior assistant registrar on 20 October 1994. An appeal was filed by all the defendants and I heard the same in chambers on 19 September 1995.

- G** That the goods were delivered is not disputed. The defendants dispute the price of the 10mm x 12m MS bar ('the bars'). Briefly stated, the agreement which sets out the price of the bars, among others, is the document dated 27 July 1990, and the price is stated to be RM1,180. This document was drawn out as a result of the previous discussion between the parties and on account of a confirmed order for the goods by the first defendant as contained in the first defendant's letter dated 25 July 1990, where the price was stated to be RM1,244 and this was the letter that the plaintiff said supported their contention that there was an error in typing the price in the latter document dated 27 July 1995. But the first defendant produced another letter, this one dated 26 July 1990, which stated the price to be RM1,180 and this letter was signed by the plaintiff. The plaintiff, without condescending to the letter of 26 July 1990, then said the price was finally resolved amicably when the first defendant by their letter dated 18 September 1990, agreed to pay the price of RM1,244. This letter reads:
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Hydrotek Engineering (S) Sdn Bhd

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18 September 1990

Teck Guan Trading Sdn Bhd
Kota Kinabalu

Attn: Mr Winston Tai

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Dear Sirs

Re: 10mm x 12m MS Round Bar

We refer to our meeting with you this afternoon in my office with the presence of your Mr Ho and our Ms Christine Voo.

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It is hereby confirmed that we have mutually agreed as follows:

- 1 The CIF KK price for 10mm x 12m MS Round Bar to be revised from RM1,180/mt to RM1,244/mt including delivery to our site in Kolombuong.
- 2 You will arrange to deliver the above MS Round Bar totalling 61.20mt to our site in Kolombuong by 19 September 1990 with no additional charge.
- 3 Should any of your materials for whatsoever reason fail to reach us within 30 days period as specified in our Sales Contract No 00/90 dated 27 July 1990, you shall arrange immediately to deliver materials from your stock or anywhere for us to use temporarily upon our request until the materials per contract arrive.
- 4 Should there be any price revision due to the Federal Price Control Policy, you are to substantiate the price revision by furnishing us with full documentation is support.
- 5 All other terms and conditions remain unchanged in our Sales Contract No 00/90 dated 27 July 1990.

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Please find enclosed herein, our 45 days (from 12 September 1990) post-dated TOB cheque No 974955 for the sum of RM65,289.78 being the balance of payment for the 61.20mt of 10mm X 12m MS Round Bar as per B/L No PGKK 2.

Kindly acknowledge acceptance by signing and returning the duplicate copy of this letter.

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Thank you.

Yours faithfully
Hydrotek Engineering (S) Sdn Bhd
—Sgd—
John Fong
Chairman

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Before this letter, there had been exchange of letters in which the plaintiff maintained that there was an error in the price while the first defendant insisted that the plaintiffs were bound by the price of RM1,180. The first defendant had on 28 July 1990, paid a 15% deposit for the various orders pursuant to the agreement of 27 July 1990, but the plaintiff refused to supply the 10mm x 12m MS bar unless the first defendant agreed to the

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- A price of RM1,244. The first defendant initially resisted the demand but later, through the letter dated 18 September 1990, agreed because according to the defendants: (1) the plaintiff persistently refused to supply; (2) they, the first defendant, had committed themselves to producing and supplying concrete requiring the bar; and (3) there was no time to look for other source of supply. As a result, the bars were delivered on 19 September 1990 as the delivery order signed on behalf of the first defendant clearly acknowledged.

Whether there was coercion or undue influence

- C It was upon the facts that I have set out that Mr PK Lim ('Mr Lim'), learned counsel for the defendants, submitted that 'an inference of undue influence and/or coercion (by reference to economic blackmail) within the meaning of s 14 of the Contracts Act 1950' ('the Act') which, according to Mr Lim, 'nullify and/or invalidate' the agreement to the price of RM1,244, arose. The increase in price resulted in the first defendant having to pay RM8,558.72 more, which the first defendant claims to be entitled to set off against the plaintiffs' claim. Could it then be argued that there was 'coercion' or 'undue influence'? The definitions of 'coercion' and 'undue influence' are supplied, respectively, by ss 15 and 16 of the Act, viz:

- E 15 'Coercion' is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

- F 16 (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

- G What is clear is that a dispute had arisen between the parties as to whether there was a mutual mistake when the document dated 27 July 1990, states the price to be RM1,180 and this dispute, to my mind, was resolved when the first defendant finally on 18 September 1990, agreed to the price of RM1,244. There are two ways of committing 'coercion' as defined by s 15, one of which is the threatening of an act forbidden by the Penal Code, while the other is the unlawful detention or the threatening of such to the prejudice of any person, with the intention of causing any person to enter into an agreement. Mr Lim did not submit whether any or which of the acts of the plaintiff can be considered as a threat to commit an act forbidden by the Penal Code and which section of the Penal Act as forbidding the threatened act. Mr Lim must say what offence the plaintiff had committed under the Penal Code before the court can decide whether such an offence had been committed (see *Pollock & Mulla on Indian Contract and Specific Relief Acts* (9th Ed) at p 133). Learned counsel had not done so. This was no surprise because the facts of this case do not reveal any offence under the Penal Code. The contention of coercion is rarely heard nowadays as pointed out by Visu Sinnadurai on *Law of Contract* (2nd Ed) at p 256, where he said:

- 6 The various definitions of 'coercion' under s 15 of the Contracts Act 1950 limit the wrong or threatened wrong to crimes under the Penal Code alone and not to include tortious wrongs. Acts which are offences other than under the Penal Code or which are merely a civil wrong will not amount to 'coercion' within the ambit of s 15. To a very large extent, this limited definition in the Contracts Act renders the scope of coercion obsolete.

This brings me to the second method of committing coercion which is the retention of property. I assume that Mr Lim is arguing, but in any event that is the only possible way it can be argued, that the refusal of the plaintiff to supply the bars at the price of RM1,180 amounted to an unlawful detention of property in order to get the first defendant to agree to the price of RM1,244. I am unable to agree that such act can come within the meaning of s 15 because the plaintiff was exercising their legal right over their own property not to deliver because they maintained the first defendant did not agree to pay the price of RM1,244 and this came about because the first defendant did not agree there was a mutual mistake in stating the price in the said document. Support for my view can be found also in *Pollock & Mulla*, at p 135 where it is said:

Unlawful detaining of property — A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section.

Therefore, there is no question of coercion being committed by the plaintiff on the first defendant. Mr Lim also submitted that the facts of this case showed the plaintiff to have resorted to 'economic blackmail' which, according to him, constituted another category of coercion. Learned counsel did not refer to any authorities. The existence of such a category under the English law, which has been variedly termed 'commercial pressure', 'economic duress' and 'unfair use of a dominant bargaining position', was commented on in *Pao On v Lau Yiu Long* [1980] AC 614 (PC) per Lord Scarman, at pp 635–636, in this way:

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 at p 336 that in a contractual situation commercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent.' This conception is in line with what was said in this Board's decision in *Barton v Armstrong* [1976] AC 104 at p 121 by Lord Wilberforce and Lord Simon of Glaisdale — observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognized in *Maskell v Horner* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not.

- A In the present case, there is unanimity amongst the judges below that there was no coercion of the first defendant's will. In the Court of Appeal, the trial judge's finding (already quoted) that the first defendant considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real was upheld. In short, there was commercial pressure, but no coercion ...
- B Recently two English judges have recognized that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 and Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' view, there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.
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- D The facts of that case were these. In February 1973, the plaintiffs sold shares of their company to a public company in return for the shares of the public company. At the request of the defendants, the plaintiffs agreed to retain 60% of their newly acquired shares until 30 April 1974, so as not to depress the market of the shares of the public company. To protect the fall of the prices of the shares happening in the meantime, the plaintiffs and the
- E defendants entered into a subsidiary agreement where the defendants agreed to buy the 60% shares from the plaintiffs on or before 30 April 1974 at RM2.50 a share. In April 1973, the plaintiffs realized the subsidiary agreement also had the effect of the plaintiffs foregoing any profit from a possible rise in the market in respect of the 60% shares. As a result, the plaintiffs refused to complete the main agreement with the public company
- F unless the defendants agreed to a cancellation of the subsidiary agreement and its replacement by the defendants' entering into a guarantee by way of indemnity. The defendants, fearing the delays of litigation and that if completion did not take place forthwith the public would lose confidence in the public company, decided to accede to the plaintiffs' demands and
- G signed a guarantee indemnifying the plaintiffs against loss resulting from the price falling below RM2.50 per share on 30 April 1974. The sale under the main agreement was thereafter completed. There was a drop in the price and the plaintiffs sued on the guarantee. The court there held, *inter alia*, at p 615:
- H (3) That, although the defendants had been subjected to commercial pressure, the facts disclosed that they had not been coerced into the contract of guarantee and, therefore, the contract was not voidable on the ground of duress; that, in the absence of duress, public policy did not require a contract negotiated at arm's length to be invalidated because a party had either threatened to repudiate an existing contractual obligation or had
- I unfairly used his dominant bargaining position in negotiating the agreement and that, therefore, the defendants, having failed to show that the contract of guarantee was either invalid or voidable, were bound by its terms.

It was also the case here, that the first defendant was subjected to commercial pressure, which Mr Lim termed 'economic blackmail', when the first defendant, faced with the prospect of not getting supply of the bars and in order to avoid that, agreed to the new price. It does not amount to coercion because the agreement to the price was an exercise of free will. As for undue influence that was alleged to be exerted by the plaintiffs on the defendant, Mr Lim appeared to be of the conclusion that the said facts, which he argued support coercion, also support the inference of undue influence. He did not elaborate. How this issue ought to be approached was stated by *Pollock & Mulla*, at p 146 in the following manner:

In *Raghunath Prasad v Sarju Prasad & Ors* AIR (1924) PC 60, the Privy Council indicated the following three stages for consideration of a case of undue influence:

- (i) whether the relations between the parties to each other are such that one is in a position to dominate the will of another;
- (ii) whether the contract has been adduced by undue influence; and
- (iii) *onus probandi*.

The parties here were dealing with each other at arms' length and in fact the first defendant had before agreeing to the new price, threatened legal action. Given their pugilistic stance before the agreement, I do not see how the plaintiff can be said to be in a position to dominate the will of another within the ambit of s 16. The transaction in this case is a transaction in the ordinary course of business not unlike illustration (d) of s 16, viz:

- (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

There is no triable issue here.

Whether there was late delivery

I am in entire agreement with the learned senior assistant registrar that the first defendant had by their letter dated 18 September 1990, agreed to accept delivery on 19 September 1990, and this was in fact done as adverted to earlier. In any event, the first defendant did not, as required by s 56(3), give notice at the time when they accepted delivery of the round bars of their intention to claim compensation for late delivery.

Whether the third defendant was liable under guarantee

The letters of demand were posted to the second and third defendant guarantors to PO Box 12200, 88824 Kota Kinabalu which were not the express address of the guarantee but was the address of the first defendant. The provision in the guarantee deeming service is cl 10 which says:

Any notice or demand made by you hereunder may be served on me/us personally or sent to me/us by post to my/our address stated overleaf or my/our last known address and if sent by post shall be conclusively deemed to

- A have been received by me/us within 48 hours after the time of posting despite any evidence to the contrary.

Mr Lim argued that 'the learned registrar erred in law and in fact by not accepting the second and third defendants' defence that they did not receive the notice of demand which was a condition precedent to be satisfied by the plaintiffs before they could sue the said defendants'. Mr Lim then referred to *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, which considered the following provision at p 284:

- B As to each of us any notice may be served on each of us or on the legal personal representative of each of us either personally or by sending the same through the post in an envelope addressed to the above-mentioned address or the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day following that on which it was posted.
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In that case, just as in this case, no explanation was given why the demand was posted to another address other than the specific address mentioned in the guarantee and the guarantor denied receiving the said demand. The Court of Appeal there held that since there was no explanation why the demand was sent to another address other than the specific address and since the denial of receipt of the demand was not controverted by affidavit evidence, the issue of demand becomes triable. This is what the Court of Appeal said, at p 286:

- D The respondent bank may well have had a good reason for selecting the addresses appearing on the letters of demand. If it did, then, it must have come out and said so and proffered an explanation. In the absence of any explanation, the affirmative statement made by the appellants upon this critical issue remained unchallenged. It is axiomatic that had the respondent either used the addresses stated in the guarantees or had given a credible explanation as to why those addresses were not used, then it may have been entitled to rely on the deeming effect of cl 8: *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413.
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I am unable to agree that *Ng Hee Thoong & Anor v Public Bank Bhd* can apply to the present case because the clause of that case is different from that of our present case. It is a matter of interpretation of a particular clause when attempting to ascertain its meaning. The wordings of the clause of the present case make it clear that the receipt of the demand is deemed to have taken place notwithstanding that the second and third defendants may not have received them and this is abundantly clear from the words 'despite evidence to the contrary' in the clause. The words of the clause allow the plaintiff to choose between sending to the specific address mentioned in the guarantee or to the 'last known address'. I am unable to agree and I do not see how the plain words in the clause can be stretched to require the plaintiff to explain why they have chosen not to send to the specific address rather than to the last known address. The words do not so require. What is required of the plaintiff is that they must have sent by post the demand to the last known address of the second and third defendants. The postal receipt had been exhibited. That the address was the last known address was asserted to in the affidavit filed on behalf of the

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plaintiff and this assertion, Mr Norbert Yapp, learned counsel for the plaintiff, correctly submitted, was never controverted. Not only that, the second defendant was at the relevant time, the chairman, and the third defendant, the general manager, of the first defendant company whose postal address was the address to which the demand on the second and third defendants was sent. Therefore, it is not only that the assertion was not controverted but the evidence also bore out that the address to which the demand was posted was the last known address of the said two defendants. As was in *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 (SC), I am also of the view that the demand had been properly served on the two defendants.

I, therefore, uphold the decision of the learned senior assistant registrar and dismiss the appeal of all the defendants with costs.

Appeal dismissed.

Reported by Ng Kian Pin

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